Filed 8/10/09 In re L.C. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re L.C. et al., Persons Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. L.C., Defendant and Appellant.	C061038 (Super. Ct. Nos. JD226203, JD226204)

L.C., the mother of minors L.C. and L.M., appeals from an order terminating her parental rights. (Welf. & Inst. Code, § 366.26; all further undesignated statutory references are to this code.) She contends that proper notice was not given under the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (ICWA) and that there is insufficient evidence the minors are adoptable. We reject her second contention, but remand the matter to the juvenile court for further proceedings under the ICWA.

FACTS AND PROCEEDINGS

On August 1, 2007, the Sacramento County Department of Health and Human Services (the Department) filed a section 300 petition as to L.C. and L.M., alleging that mother had engaged in domestic violence with both her husband and her current live-in boyfriend since 2004, in the presence of three-year-old L.C., four-year-old L.M., and their siblings (six-month-old La.M., seven-year-old Daj.C., 11-year-old Dan.C., 13-year-old Das.C., and 16-year-old L.A.).

In its detention report, the Department stated that mother's husband, L.Mi., was the father of L.M.; mother's current boyfriend, M.M., was the father of her youngest child (La.M.); and the identities and whereabouts of the other children's fathers were unknown to the Department. Despite the domestic violence between mother and M.M., she continued a relationship with him and refused to secure a restraining order against him; he denied any domestic violence or need for services.

An addendum report stated that mother had told the Department that M.M. was no longer living with her, but on an unannounced home visit on August 10, 2007, the social worker had found him there along with her. The social worker also detected beer cans and an odor of marijuana at the residence.

At the detention hearing on August 16, 2007, mother told the juvenile court that she was currently divorcing L.Mi. (who was the father of L.C., not of L.M.). She confirmed that M.M.,

her boyfriend, was the father of her youngest child, La.M. Her ex-husband D.C. was the father of Dan.C. and Das.C. She had never been married to the fathers of L.M. and L.A.

The juvenile court ordered the minors detained (except for 16-year-old L.A., who was released to mother under the Department's supervision). Because mother claimed Blackfeet and Cherokee heritage, the court ordered the Department to give ICWA notice to those tribes and to the Bureau of Indian Affairs (BIA).

On August 23, 2007, Carol Michie, a paralegal employed by the Department, filed a declaration on ICWA investigation and notice. According to Michie, mother claimed Indian ancestry on both sides of her family, but did not think her parents would have any further information. Michie did not indicate any attempt to contact the maternal grandmother.

Michie attached the notices and supporting documents she had sent on August 22, 2007, to the BIA, the Blackfeet tribe, and the three federally recognized Cherokee tribes. These documents give the maternal grandmother's last name as Beaver (apparently her maiden name, though the notices do not say so) and her address in Sacramento.

The Department's jurisdiction/disposition report, prepared for a hearing to be held on September 5, 2007, recommended that all of the minors be adjudged dependents of the juvenile court and remain in out-of-home placement (except for L.A., currently in the care of his maternal aunt) and that mother receive reunification services.

Under the heading "Collateral Contacts," the report discusses the social worker's telephone interview with the maternal grandmother (which did not go into the family's alleged Indian heritage). Her last name is given as Braziel, not Beaver. She is said to live at a different address from that furnished to the tribes. Her telephone number, which was not provided to the tribes, is also given.

On September 14, 2007, the Department paralegal Michie filed a declaration of receipt of ICWA return receipt cards and correspondence. All responding tribes stated they had been unable to verify that the children and adults whose names they had been given had Indian ancestry.

On September 19, 2007, the juvenile court held a jurisdiction/disposition and paternity hearing and set the matter for a pretrial/jurisdiction/disposition hearing and a contested jurisdiction/disposition hearing.

At the pretrial/jurisdiction/disposition hearing on October 3, 2007, the juvenile court authorized L.M. and L.C. to be detained in the home of their maternal aunt T.S. The court was informed that the required tribes had received ICWA notice.

On October 16, 2007, and November 7, 2007, Michie submitted further declarations averring that the BIA and all noticed tribes (Cherokee Nation of Oklahoma, Eastern Band of Cherokee, United Keetoowah Band of Cherokee Indians, and Blackfeet Tribe) had now responded. The tribes had stated that the minors were not Indian children.

In a further addendum report, the Department noted that although mother was participating in services and making some progress, she continued to violate court orders by maintaining contact with M.M., who had not participated in services and repeatedly tested positive for alcohol and drugs.

On November 14, 2007, the juvenile court held a hearing on the applicability of the ICWA. (We have only a minute order for this hearing, unlike other hearings in the case. The minute order shows that counsel for all parties were present, but does not say they argued.) The court found that notice had been properly given, the tribes had responded negatively, and the ICWA did not apply.

The juvenile court held a contested jurisdiction/disposition hearing on January 11, 2008. The court adjudged the minors dependents and committed L.M. and L.C. to the Department's custody for out-of-home placement, while ordering reunification services for mother. (The maternal aunt with whom L.M. and L.C. had been placed had lost her housing.) The matter was set for a permanency hearing as to L.M. and L.C. on April 4, 2008.

The Department's six-month review report recommended terminating mother's reunification services. (Services had never been ordered for the alleged fathers of L.M. and L.C.) L.M. and L.C., who were placed together, had a strong bond with their caregivers and with each other. L.C. was physically healthy and on target developmentally, although he had had problems with toilet training. L.M. was also on target

developmentally and very sociable, but had eczema and asthma, for which he was receiving medication.

After a contested permanency hearing on July 14 and 15, 2008, the juvenile court terminated mother's reunification services, found it likely that L.M. and L.C. would be adopted, and ordered adoption as the permanent plan for them.

The Department's selection and implementation report discussed not only L.C. and L.M., but also La.M. and Dan.C., who were in a separate foster placement within the juvenile court's jurisdiction. The selection and implementation hearing was subsequently continued as to La.M. and Dan.C.; thus, the juvenile court's orders concerning L.C. and L.M. at the selection and implementation hearing do not cover La.M. and Dan.C., who are not parties to this appeal. But in attacking the court's finding that L.C. and L.M. are adoptable, mother relies in part on a statement made in the selection and implementation report as to all four siblings together, which we therefore quote below.

As relevant to the issues raised in this appeal, the report stated:

L.C. was in good physical health and very active, but had trouble with his speech and could be hard to understand; he was receiving speech therapy at school. He was also having behavior problems there, though not at home. He had an IEP (individual education plan) scheduled for November, at which time he would be tested for ADHD. He liked his caretakers and his present

home. He did not participate in counseling and did not need to. He and L.M. were closely bonded and shared a room.

L.M. was a talkative, friendly child, reaching all appropriate milestones for his age. He behaved well at school. He did not need any special educational services. However, he had health problems. He had been diagnosed with eczema, asthma, and allergies, for which he had received prescriptions; he saw a pulmonologist regularly. He had been hospitalized twice due to asthma attacks. He could administer his own inhalers with adult supervision. He liked his caretakers and his present home. He did not participate in counseling or need to.

The boys' current caretakers, with whom they had been placed since November 16, 2007, wanted to adopt them if parental rights were terminated. Although they had been married for only two years, they both had grown children. Both worked for the State of California. They had a close-knit and highly active family. They looked forward to raising children again. They were well aware of the children's needs and of the legal and financial issues associated with adoption. They had been screened and cleared for criminal records and child abuse or neglect. They had educated themselves about asthma and had learned how to administer medication to L.M.; they were also prepared to help L.C. with his speech problems and to see his therapy through. They had a system in place to help L.C. learn appropriate behaviors.

"The children [i.e., L.C., L.M., La.M., and Dan.C.] are specifically adoptable, as they are part of a siblings set and

[Dan.C.] is over the age of seven. . . . The caretakers are willing to complete the homestudy process with Sacramento County and to maintain the sibling relationships."

The likelihood of all the minors being adopted and of being placed with their current caretakers was strong. All were thriving in their current placements. It was in their best interest to terminate parental rights to allow for permanency through adoption.

The juvenile court held a selection and implementation hearing as to L.C. and L.M. on January 23, 2009. The court terminated mother's parental rights and found clear and convincing evidence that it was likely the children would be adopted.

DISCUSSION

I

Indian Child Welfare Act Notice

Mother contends reversal is required because the Department failed to interview the maternal grandmother about the children's alleged Indian ancestry and failed to give the tribes notice of the maternal grandmother's true name and address. We agree. We shall reverse and remand the matter with directions that the juvenile court vacate its order terminating parental rights and reconsider the issue of ICWA notice compliance after the Department has properly performed its duties under ICWA.

"Notice under the ICWA must . . . contain enough information to constitute meaningful notice. . . ." (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175 (*Karla C.*).)

"[B]y federal regulation an ICWA notice must include, *if known*, (1) the name, birthplace, and birth date of the Indian child; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) *names and addresses of the child's parents, grandparents, great-grandparents and other identifying information*; and (4) a copy of the dependency petition. (25 C.F.R. § 23.11(d)(3) (2003); 59 Fed.Reg. 2248 (eff. Feb. 14, 1994).) '[T]o establish tribal identity, it is necessary to provide as much information as is known on the Indian child's direct lineal ancestors.' (25 C.F.R. § 23.11(b) (2003).)" (*Karla C.*, *supra*, 113 Cal.App.4th at p. 175, some italics added; accord, *In re Mary G.* (2007) 151 Cal.App.4th 184, 209; see also § 224.2, subd. (a)(5) [requiring same information].)

"If the court, social worker, or probation officer knows or has reason to know that an Indian child is involved, the social worker or probation officer is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, *and extended family members* to gather the information required in paragraph (5) of subdivision (a) of Section 224.2 . . . ." (§ 224.3, subd. (c), italics added.)

The Department here failed both to perform the inquiry spelled out in section 224.3, subdivision (c), and to provide

the notice spelled out in section 224.2, subdivision (a)(5). On this record, we cannot find these errors harmless. (Cf. *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 784 (*Nicole K.*) [ICWA notice errors subject to harmless error review].)

As the Department admits, the person it designated to investigate the children's Indian ancestry, paralegal Michie, failed to interview the maternal grandmother. Even though mother claimed Indian ancestry on both sides of her family, Michie apparently took mother's word for it that the grandmother would have no further information. The record shows that the grandmother was easily reachable and willing to discuss anything she was asked about; thus she would presumably have disclosed whatever she knew about the family's ancestry. At the least, the Department was required to find out what she knew. Without doing so, the Department could not properly aver that it had obtained the information needed to give adequate ICWA notice.

Furthermore, the notice the Department gave the tribes misstated the maternal grandmother's name and address. (Although the last name given was actually her maiden name, the notices failed to say so.) Lacking the correct name and address, the tribes could not contact the grandmother or determine whether she was listed in their records. Thus, they did not have the requisite basis on which to state definitively whether the minors were or were not Indian children. (The tribes were well aware of this possibility. For instance, the Cherokee Nation's response includes the bold-type caveat: "This determination is based on the above listed information exactly

as provided by you. Any incorrect or omitted family documentation could invalidate this determination.")

The Department asserts mother has failed to show error because (1) we do not have a reporter's transcript of the ICWA compliance hearing; (2) the minute order does not show that mother's counsel claimed ICWA notice deficiencies; (3) we should presume he did not do so because there were none; and (4) therefore, we must conclusively presume the juvenile court's finding of compliance correct. We disagree. The record suffices to show error occurred, and it is immaterial whether mother's counsel raised the issue because ICWA noncompliance cannot be waived by a parent's failure to raise it. (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 849 (*Nikki R.*); accord, *In re J.T.* (2007) 154 Cal.App.4th 986, 991.)

The Department asserts any error was harmless because it was entitled to rely on mother's representation that the grandmother had no further information. We do not see why it was entitled to do so. It cites case law which observes that parents normally have greater access to information about Indian ancestry than do social workers and juvenile courts. (*In re A.B.* (2008) 164 Cal.App.4th 832, 843; *In re Miracle M.* (2008) 160 Cal.App.4th 834, 847; *In re S.B.* (2005) 130 Cal.App.4th 1148, 1160.) But these decisions do not hold that when a parent says other family members have no information, the Department may simply take her word for it.

The Department also quotes out of context the following statement from *In re Rebecca R.* (2006) 143 Cal.App.4th 1426,

1431: "The knowledge of any Indian connection is a matter wholly within the appealing parent's knowledge and disclosure is a matter entirely within the parent's present control." But in *Rebecca R.*, the responsible agency was not on notice of possible Indian ancestry because the parent first claimed it on appeal. (*Ibid.*) Here, mother's timely claim put the Department on notice of its need to investigate the matter fully, which it failed to do.

The Department asserts that "[e]ven if it might have been prudent . . . to contact the grandmother," not contacting her was harmless error because the Department's obligation "is only one of inquiry and not an absolute duty to ascertain or refute Native American Ancestry." (See *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413.) The Department misconceives its obligation. In *Antoinette S.*, the agency fulfilled its duty of inquiry by obtaining all the information the parents had to give, and the appealing parent suggested no other source of information that could have been tapped. (*Ibid.*) Here, by contrast, the Department knew of a person whom the relevant statute on its face (§ 224.3, subd. (c)) required to be interviewed, but did not even try to interview her. It was not merely "prudent" to do so: it was mandatory.

The Department asserts: "A finding of harmless error is consistent with the recent trend in the courts recognizing the need to balance judicial economy and the child's need for stability against the futility of providing additional notice in the absence of evidence that a child is an Indian child."

Furthermore, according to the Department, it is "pure speculation" that interviewing the maternal grandmother would have provided useful information. This reasoning is misguided.

There was not an "absence of evidence" that the children in this case were Indian children: the mother's claim of Cherokee and Blackfeet ancestry on both sides of her family was evidence. And if the Department could excuse its failure to inquire merely because we cannot know whether inquiry would have produced further information, section 224.3, subdivision (c), and with it the ICWA itself, would be rendered impotent.

Finally, we note that the Department does not even try to explain how it could be harmless error to have given the tribes the wrong name and address for the maternal grandmother, thus making it impossible for them to perform the inquiry the Department failed to perform.

The Department asks that if we find ICWA notice noncompliance, we remand only "for the limited purpose of determining compliance with the ICWA notice requirements" and otherwise affirm the juvenile court's orders. We may not do so.

This court has held that the failure of ICWA notice requires not merely remand to the juvenile court but the vacation of the court's orders, even if the petitioner's parental rights have not yet been terminated. "Even assuming ICWA errors are not jurisdictional, we conclude the failure to give ICWA notice means that the orders in this case cannot stand. Petitioner seeks review of a hearing at which her reunification services were terminated and the juvenile court

ordered continued out-of-home placement for the minors and set a hearing to consider termination of parental rights. If [ICWA] notice . . . revealed that the minors are Indian children, the provisions of ICWA would have applied at the hearing and would have prevented [the agency] from seeking foster care placement or termination of parental rights unless it established that 'active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family . . . .' (23 U.S.C. § 1912(d).) Because the juvenile court's orders are based on a lesser standard, they must be vacated until ICWA notice is provided and the court determines what standard should have been applied." (*Nicole K., supra*, 146 Cal.App.4th at p. 785.) Furthermore, even courts that have found ICWA notice errors nonjurisdictional in general have opined that orders terminating parental rights after inadequate ICWA notice must be reversed. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 187; *In re Brooke C.* (2005) 127 Cal.App.4th 377, 385; *Nikki R., supra*, 106 Cal.App.4th at pp. 855-856.) Thus, under either line of authority, we have no discretion to affirm the juvenile court's orders aside from its finding of ICWA compliance.

On remand, the juvenile court is directed to vacate its order terminating parental rights and to revisit the issue of ICWA notice compliance after the Department has interviewed the maternal grandmother about the children's alleged Indian ancestry and has given the tribes her correct name and address. If the court then finds that ICWA notice has been properly given

and the tribes have determined the children are not Indian children, the court shall reinstate its order terminating parental rights. If any tribe determines that the children are Indian children, the court shall proceed in accordance with ICWA.

For the guidance of the juvenile court and the parties on remand, we address the adoptability issue raised by mother. As will appear, we reject mother's contention.

II

The Children's Adoptability

Mother contends insufficient evidence supports the juvenile court's finding that the minors are adoptable. We disagree.

"If the court determines, based on the assessment . . . and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted." (§ 366.26, subd. (c)(1).)

Determination of whether a child is likely to be adopted focuses first upon the characteristics of the child. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649 (*Sarah M.*).) The existence or suitability of the prospective adoptive family, if any, is not relevant to this issue. (*Ibid.; In re Scott M.*

(1993) 13 Cal.App.4th 839, 844 (*Scott M.*).) "[T]here must be convincing evidence of the likelihood that the adoption will take place within a reasonable time." (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.) The fact that a prospective adoptive family is willing to adopt the minor is evidence that the minor is likely to be adopted by that family or some other family in a reasonable time. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.)

At the section 366.26 hearing, the possibility of a legal impediment to adoption by the prospective adoptive parents is irrelevant unless the child's characteristics make it so difficult to find any other family willing to adopt the child that the child is unlikely to be adopted by anyone but the prospective adoptive parents. (*Sarah M., supra*, 22 Cal.App.4th at p. 1650; Fam. Code, § 8600 et seq.) "General suitability to adopt . . . does not constitute a legal impediment to adoption." (*Scott M., supra*, 13 Cal.App.4th at p. 844.)

We review the juvenile court's finding that the minors are likely to be adopted within a reasonable time under the substantial evidence standard, giving it the benefit of every reasonable inference and resolving any evidentiary conflicts in favor of affirming. (*In re I.I.* (2008) 168 Cal.App.4th 857, 869 (*I.I.*).)

Mother asserts the court's finding is not supported by substantial evidence because (1) there was a lack of evidence that the minors are generally adoptable, and (2) there was insufficient evidence as to when the prospective adoptive

parents would start the home study process. We are not persuaded.

So far as mother claims the juvenile court was required to make an express finding of "general adoptability" as an alternative to adoptability by the prospective adoptive parents, she is wrong. The decisions she cites for this proposition do not support it. *Sarah M., supra*, 22 Cal.App.4th 1642 does not hold that any such finding is required. And *In re A.A.* (2008) 167 Cal.App.4th 1292 holds plainly, just before the passage mother quotes, that it is not: "Contrary to appellant's claim, the law does not require a juvenile court to find a dependent child 'generally adoptable' before terminating parental rights. All that is required is clear and convincing evidence of the likelihood that the dependent child will be adopted within a reasonable time. [Citations.]" (*Id.* at p. 1313.) The juvenile court made that finding here.

So far as mother claims there was no evidence the children were likely to be adopted within a reasonable time even if the prospective adoptive parents did not adopt them, she is mistaken. She asserts that in making its finding the juvenile court considered only the Department's section 366.26 report, which opined only that the minors were specifically adoptable by the prospective adoptive parents. Mother's assumption is ungrounded. First, we presume that the court considered the entire record in making its finding, and mother points to nothing in the record suggesting otherwise. Second, the Department's report itself impliedly finds the minors are

adoptable even if the current caretakers do not adopt them, because it does not state that the minors' characteristics would make them difficult to place with any other adoptive family. (See *I.I., supra*, 168 Cal.App.4th at p. 870; *Sarah M., supra*, 22 Cal.App.4th at pp. 1649-1650.)

Mother asserts that the minors have such characteristics: L.M. has eczema, asthma, and allergies, while L.C. has speech problems and has been acting out at school. However, mother cites no authority holding that such run-of-the-mill problems, for which standard therapies exist and have already begun or will in the near future, are sufficient to render a child not generally adoptable, and we know of no such authority.

Because mother has not shown that the minors are unlikely to be adopted by some prospective adoptive family within a reasonable time, we need not consider mother's contention that there could be a legal impediment to adoption by the minors' current caretakers in that they have not indicated when they will begin the home study process. (See *Sarah M., supra*, 22 Cal.App.4th at p. 1650.)

We also need not consider the legal effect of the Department's statement in its section 366.26 report, quoted by mother, that "[t]he children are specifically adoptable, as they are part of a sibling set and [Dan.C.] is over the age of seven." As our account of the facts shows, this statement was based on the assumption that all four minors for whom the section 366.26 hearing had been scheduled would be disposed of together, but that assumption ceased to be operative when the

hearing was continued as to the other two minors. Thus, the Department's statement is irrelevant at this stage.

DISPOSITION

The matter is reversed and remanded to the juvenile court with directions that the court: (1) vacate its order terminating mother's parental rights, and (2) order the Department to interview the maternal grandmother as to the minors' Indian ancestry and to provide new ICWA notice that includes her correct name and address. If, following such notice, any of the tribes determine that the minors are Indian children as defined by ICWA, the court shall conduct a new review hearing in conformity with all the provisions of ICWA. If, however, the tribes determine that the minors are not Indian children, or if no response is received indicating the minors are Indian children, the court shall reinstate the vacated order.

HULL, J.

We concur:

SCOTLAND, P. J.

ROBIE, J.